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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re C.S. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ALISA S., Defendant and Appellant.	D060361 (Super. Ct. No. EJ3399B-D)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

Alisa S. appeals following the dispositional hearing in the juvenile dependency case of her children, C.S., L.S. and J.S. (together, the children). Alisa contends the order placing the children in Utah with their father, Andrew S., must be reversed because the placement is emotionally detrimental to the children. Alisa also contends the court erred

by terminating dependency jurisdiction, awarding sole physical custody of the children to Andrew and restricting her contact with the children. We affirm.

BACKGROUND

Alisa and Andrew were divorced in December 2008 in Utah. They were awarded joint legal custody of the children and the children's older brother, A.S.[1] Alisa obtained sole physical custody and Andrew was allowed "parent-time." At the time of the divorce, A.S. was 10 years old, C.S. was nearly six years old, L.S. was three years old and J.S. was not yet one year old. Later, A.S. said Alisa told him and the children that Andrew did not want to be part of their family, and L.S. said Alisa told him that Andrew hated him. Andrew said that in 2008 the children left him a message stating "they did not want him as a dad."

In February 2009 there was a substantiated child welfare referral in Utah that the children were unsupervised and neglected. A voluntary services case was opened for Alisa. She refused to participate and moved with the children to Montana. In May, there was a report in Montana that the children were unsupervised, 10-and-on-half-year-old A.S. might be "parentified" and he and C.S. were often very late to school.[2]

There were additional child welfare referrals in September and October 2010 based on the following events.[3] When A.S. was cooking dinner for the children, hot oil

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1 A.S. is not a subject of this appeal, and we mention him only as necessary.

2 The record does not disclose the disposition of this referral.

3 The exact sequence of events is unclear.

spilled on L.S. L.S. suffered severe burns and was flown from Montana to a hospital in Utah. Alisa accompanied L.S. and left A.S., C.S. and J.S. home with her husband, Evan E. A.S., C.S. and J.S. ran away; called Alisa; and said Evan was beating them. A.S. said Evan had hit him in the face at least twice, cutting his lip and causing bleeding, and had beaten his head with a towel, causing his neck to pop. C.S. said Evan had hit her in the face, bloodying her nose. She said she had seen Evan push A.S. over a rat cage in the home, injuring A.S.'s back. The children said Alisa was aware of Evan's abuse of A.S. and had "told them not to tell." A.S. reported that Evan drank regularly while Alisa was at work, passed out and left the children to fend for themselves. There was a report that Evan came home drunk and threatened Alisa with a hatchet while she was holding J.S. Alisa took the children to stay with a maternal uncle in Utah, then began moving the children from home to home. A family preservation case was opened and shared by agencies in Montana and Utah.

In November 2010 there were more referrals in Montana based on the following events.[4] The police were called after the children ran to a neighbor's home, saying "Evan is beating up mom." Evan beat A.S. Alisa removed the children from school to home school them, but did not follow through with the home schooling. In late November, the child welfare service in Montana determined Alisa was being protective because she said she was moving to San Diego without Evan, and she asked that her new address be confidential. Child welfare service personnel told Alisa that if she returned to Evan and

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4 The record does not disclose the disposition of these referrals.

allowed him contact with the children, there would be a serious concern for the children's safety and well-being.

Alisa later admitted she had planned for Evan to accompany her to San Diego, and they began living together there in March 2011, after he had participated in an anger management class. On March 25, 2011, Evan hit Alisa in the head numerous times while she was changing J.S.'s diaper, causing a small bruise near Alisa's ear. Evan was arrested for inflicting corporal injury on a spouse, and the police report listed L.S. and J.S. as witnesses.

On May 4, 2011, the police were called to the family home after someone heard Alisa screaming. When the police arrived, Alisa had a black eye and Evan was gone. On May 10, there was a child welfare referral regarding domestic violence between Alisa "and the man who lived" with her. Alisa claimed the man was the babysitter, but neighbors said he often left the children home alone while Alisa was at work, and the children were at home during school hours.

On May 11, 2011, the San Diego County Health and Human Services Agency (the Agency) detained the children. When L.S. told a social worker Evan had hit Alisa, A.S. said "shhh." A.S. told C.S. to say "Mom was protective." In separate interviews, the children disclosed Evan's previous physical abuse of Alisa and the children. C.S. said Evan had threatened to kill Alisa.

On May 14 and 15, 2011, the police were called to the home again on reports of domestic violence. On May 16, the Agency filed dependency petitions for eight-year-old C.S., five-and-one-half-year-old L.S. and three-year-old J.S. The petitions were based

largely on domestic violence between Alisa and Evan, and Evan's physical abuse of C.S. and 12-and-one-half-year-old A.S.

At the time the petitions were filed, Andrew had not had any contact with the children in about three years, and had not known their whereabouts. He lived in Utah with his wife and their young children. Although Andrew's home was not large enough to accommodate the children in addition to his current family, he appeared telephonically at the detention hearing and requested custody of the children.

On May 16, 2011, the court ordered the children and A.S. detained in a foster home. The court ordered liberal supervised visits for Alisa and unlimited telephone calls for Andrew. The court gave the social worker discretion to detain the children with either parent with the concurrence of the children's counsel, and discretion to allow Alisa unsupervised visits with notice to the children's counsel. The court issued a temporary restraining order (TRO) protecting Alisa and the children from Evan.

On May 26, 2011, Alisa told the social worker that she had left Evan, but she loved him and wanted to mend their relationship. Alisa claimed the domestic violence was not severe. On June 2, Alisa told the social worker that all of the past child welfare referrals were false. On June 3, J.S. spontaneously told the foster parent that Evan had "hit mommy in the eye."

On June 7, 2011, the social worker met Alisa at court before a hearing. The social worker noticed a bruise between Alisa's eyes, and bruises on her upper arm that appeared to be a "grab mark." Alisa explained she bruised easily and had bent down and bumped her head on a kitchen drawer. She denied having any communication with Evan or

knowing his whereabouts, although she knew he was in San Diego. Evan appeared at the hearing and requested visitation with the children. Alisa did not seem bothered by his presence or his request. The court reissued the TRO and Evan was served.

The children told the social worker they wanted to live with Alisa, but by early June 2011, the children had had consistent, positive telephone contact with Andrew. On June 12, the Agency exercised its discretion to detain the children with him. Until Andrew found a larger home, and with the Agency's approval, he left A.S. and C.S. in the care of a maternal uncle in Utah, and L.S. and J.S. in the care of the paternal grandparents in northern California. By June 28, Andrew had found a larger home and planned to move on July 25. The Agency recommended the children be placed with him and jurisdiction be terminated, with joint legal custody for Alisa and Andrew, sole physical custody for Andrew and supervised visitation for Alisa. On July 20, the court limited Alisa's telephone calls to the children to two per day.

On July 21, 2011, the manager of Alisa's apartment complex said he had seen Evan the previous week entering Alisa's apartment with a key. Evan ran away when he saw the manager. The manager said he had seen Evan running through the complex on more than one occasion. When the manager confronted Alisa, she said "No, couldn't be." A neighbor said she had seen Evan at the complex on July 20, and about two weeks earlier she had seen him entering Alisa's apartment through a window.

On July 8, 2011, the petitions were amended by interlineation to include details of the domestic violence and Evan's physical abuse of A.S. and C.S., and the court entered true findings on the amended petitions. On July 25, Andrew moved into his new house.

Within several days, the children were living with him. On July 28, Alisa told the social worker she had had no contact with Evan, she heard he had left for Utah and she had the only key to her apartment, although some of his possessions were still there.

The TRO expired and on August 3, 2011, the court granted Alisa's counsel's request for a new TRO. The dispositional hearing took place that month. On August 8, Alisa testified the children had been removed from her home because Evan hit her. She acknowledged that when the children were removed, they were in danger of witnessing domestic violence, but claimed there was no longer a risk of violence. Alisa testified she had ended her relationship with Evan, ceased contact with him and changed the locks to her apartment. When the dispositional hearing resumed on August 11, Alisa appeared in court with a black eye. She testified Evan "hit me yesterday" but denied he was "back in the home."

Alisa submitted on the issue of removal but contested the Agency's recommendation that the children be placed with Andrew. The court ordered the children removed from Alisa's custody (Welf. & Inst. Code, § 361, subd. (c)(1)),[5] found that placement with Andrew would not be detrimental to the children, awarded him physical custody and designated his home as the children's primary residence. The court ordered joint legal custody. It allowed Alisa up to two supervised visits per month in Utah, and unsupervised telephone calls three days a week, or every other day, lasting up to one hour, preferably at the same time of day, with the time to be decided by Andrew, who

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5 Further statutory references are to the Welfare and Institutions Code.

was "to make every effort to cooperate with" Alisa. The court ordered its custody and visitation orders filed in family court and terminated dependency jurisdiction. In A.S.'s case, the court ordered foster care placement, sibling visitation and reunification services for Alisa and Andrew.

PLACEMENT WITH ANDREW

"When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a [noncustodial] parent[6] . . . who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd (a).) Section 361.2, subdivision (a), evidences "the Legislative preference for placement with [the noncustodial] parent." (*In re Austin P*. (2004) 118 Cal.App.4th 1124, 1132.)

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6 "[N]oncustodial parent" means the parent "with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300." (§ 361.2, subd. (a); *In re V.F*. (2007) 157 Cal.App.4th 962, 969, called into doubt by statute on another ground as stated in *In re Adrianna P*. (2008) 166 Cal.App.4th 44, 57-58.) Andrew was clearly a noncustodial parent, and he had no criminal or child welfare history. After this case began, however, Alisa told the social worker she suspected Andrew of molesting C.S. Alisa explained that at some unspecified past time, Andrew was "out of bed for a long time at night" and she found him around C.S.'s room. Alisa claimed that C.S. had "some sexualized behavior" and spoke "inappropriately in a joking manner." Alisa admitted she had not confronted Andrew with her concerns, nor had she reported her suspicions to the police, any child welfare agency or the children's counsel. At trial Alisa testified that after her divorce from Andrew, he had visits with the children, and by that time her "concerns had lessened." C.S. told the social worker Andrew loved her and she had never been scared of Andrew, but she was scared of Evan.

In the juvenile court, Alisa had the burden of proving detriment by clear and convincing evidence. (*In re Luke M*. (2003) 107 Cal.App.4th 1412, 1426; *In re Isayah C*. (2004) 118 Cal.App.4th 684, 700; *In re John M.* (2006) 141 Cal.App.4th 1564, 1569-1570.) On appeal, she has the burden of showing the finding of no detriment is unsupported by substantial evidence. (*In re Diamond H*. (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground by *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) We review the record in the light most favorable to the court's order. (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1426.) " ' "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." [Citations.]' [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881, quoted in *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.) "We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Under this deferential standard of review, we conclude, as explained below, that Alisa has failed to meet her burden of showing there is no substantial evidence supporting the finding that placement with Andrew would not be detrimental to the children's "safety, protection, or physical or emotional well-being." (§ 361.2, subd (a).)

Preliminarily, we note Alisa does not contest the order removing the children from her custody. This is understandable in light of the facts. The children were exposed to many incidents of domestic violence and Evan was violent with A.S. and C.S. Despite repeated intervention by the police and child welfare agencies, Alisa minimized Evan's violence toward her, denied his violence toward the children and failed to protect them. At trial, Alisa acknowledged domestic violence "can affect" the children.[7] Nevertheless, she was still in contact with Evan and the violence continued. On this record, Alisa could not meet her burden (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1135; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420) of showing there was no substantial evidence of "a substantial danger to [the children's] physical health, safety, protection, or physical or emotional well-being" (§ 361, subd. (c)(1)) if the children were not removed from her custody.

In support of her contention that the court erred in placing the children with Andrew, Alisa asserts the placement will be detrimental to the children's emotional well-being (§ 361.2, subd. (a)) and questions his commitment to the children. She notes that before the beginning of this case, the children had not seen him for years; he initially said he did not have room in his home for them; and upon their detention with him, the children lived in two separate relatives' homes. As further support for her contention, Alisa cites the children's bond with her and Andrew's attempts to limit her telephone

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[7] Alisa testified that boys who witness domestic violence "can grow up believing that violence is acceptable . . . and possibly become abusers themselves," and witnessing violence "would put [C.S.] in a position of possibly entering into an abusive relationship herself."

conversations with the children. As discussed below, these factors do not undermine the court's finding of a lack of detriment.

Approximately two months before the dispositional hearing, Andrew and the children began telephone conversations. The telephone contact occurred regularly and was a positive experience for the children. They were happy to talk with Andrew, and C.S. and L.S. reported that Andrew loved them. As a further demonstration of his commitment to the children, Andrew found a larger home shortly after the court ordered the children detained with him, and soon he and the children were living there.

As might be expected, the move to Andrew's home involved a period of adjustment for the children and some degree of emotional upheaval. For three years Alisa had been the children's sole caregiver, and Andrew was new to that role. The children cried, said they wanted to go home to Alisa, had problems sleeping, and there was some acting out. The social worker testified this behavior was typical of children removed from a custodial parent, and generally subsided when children stabilized in their new placement. According to the social worker, Andrew addressed the children's difficulties appropriately, and the transition proceeded normally. By the time of trial, the children were doing well and to ease their adjustment, Andrew had initiated family counseling for all members of the household.

Andrew's commitment was further evidenced by his belief that it was important for the children to have contact with Alisa. He testified he would facilitate contact, and if the children asked, he would allow them to call Alisa. The demands of Andrew's job and school, and running a household with six children, made it difficult to field two daily

telephone calls from Alisa as the court had ordered,[8] but he complied with the order. When Alisa called twice a day, the children ran out of things to say, and J.S. sometimes declined to talk to her. Additionally, Alisa was sometimes inappropriate. She asked C.S. about Andrew's family, and C.S. worried that Alisa would be mad if C.S. withheld information.[9] The children became upset after the telephone calls. This was particularly true for C.S., who missed Alisa. For those reasons, Andrew suggested that Alisa call once or twice a week, but agreed to abide to the court's order for more frequent calls.

As additional support for her contention that placement with Andrew will cause the children emotional detriment, Alisa claims the placement will interfere with her ability to reunify. Clearly, the distance between California and Utah presents an obstacle to in-person visitation. However, that obstacle is far less significant when compared to the obstacles to reunification presented by Alisa herself. Despite a long history of domestic violence and abusive behavior, Alisa maintained contact with Evan. Moreover, even though she acknowledged the detrimental impact domestic violence has on children, Alisa had not begun domestic violence treatment because "[it] has not been required of me." "[O]nce dependency jurisdiction is acquired because of the custodial parent's conduct, the court's inquiry shifts to a focus on the child's best interests, albeit with a preference towards parental reunification." (*In re Luke M., supra*, 107 Cal.App.4th at

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8 Andrew testified Alisa did not always call twice a day, and the children had not asked to call her.

9 Andrew and his wife were concerned that Alisa might provide misinformation to the wife's ex-husband, who was violent.

p. 1425.) Where, as here, a nonoffending noncustodial parent has requested custody and the offending custodial parent has failed to protect the children from serious domestic violence, the children's interest in a home free of violence takes precedence over Alisa's wish to reunify.

Alisa also claims that placement with Andrew will cause the children emotional detriment because they will be separated from A.S., with whom they are strongly bonded. Although "a detriment finding can properly be supported by the emotional harm arising from the loss of sibling relationships" (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1425), that relationship is only "one factor, among many," (*id.* at p. 1422) that is to be considered when determining detriment. Here, the children's relationship with A.S. was not a beneficial one. Although he provided the children some supervision during Alisa's absences from the home, there was evidence of a negative and angry dynamic in his relationship with the younger children. A.S. was physically aggressive, displayed an intense and extreme anger toward the children and yelled and screamed at them. Andrew's observation of this behavior led him to believe A.S. might hurt the children. A.S. drew pictures that were violent in nature, contained explicit sexual messages and depicted A.S. hurting C.S. A.S. told Andrew, "I never get the revenge that I want," and told the social worker he had wanted to hurt C.S., but had merely shoved and pushed her. C.S., citing A.S.'s anger, said she did not want to talk to him.

Alisa did not meet her burden of showing that placement with Andrew would be detrimental to the children's emotional well-being. Substantial evidence supports the court's determination to place the children with Andrew.

CUSTODY AND VISITATION ORDERS

Alisa contends that in light of Andrew's disinclination to nurture the children's bond with her and A.S., the court erred by terminating dependency jurisdiction and awarding Andrew sole physical custody. Alisa asserts the lack of reunification services and oversight of her visitation was not in the children's best interests, and unfairly required her to resort to family court for enforcement or modification of the custody and visitation orders.

Section 361.2, subdivision (b), gives the juvenile court three choices once it decides to place children with a noncustodial parent. First, as the court did here, it may make custody and visitation orders, to be filed in family court, and terminate dependency jurisdiction. (§ 361.2, subd. (b)(1).) Second, the court may retain dependency jurisdiction and require the Agency to conduct a home visit within three months, after which the court may proceed pursuant to any of the three options in section 361.2, subdivision (b). (§ 361.2, subd. (b)(2).) Third, the court may retain dependency jurisdiction and order services for either parent or both parents, and if it orders services for both, it may make a custody determination at a review hearing. (§ 361.2, subd. (b)(3).) In making this decision, the court is to promote the children's best interest. We review the juvenile court's choice among these three options for an abuse of discretion. (*In re Austin P.*, *supra*, 118 Cal.App.4th at p. 1135; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300.)

Although Andrew had had no contact with the children for three years, this must be viewed in the context of Alisa's efforts to alienate the children from him after the

divorce. When Andrew learned of this dependency case, he requested custody of the children, accepted complete responsibility, acted in a parental capacity and expressed his love and concern for the children. He provided for them in every way, including moving to a larger home and initiating family counseling. The social worker believed the children were not in need of services that required the Agency's supervision.

Alisa's complaint that she must go to family court for future assistance is unpersuasive. Day in and day out, divorced parents rely on family court to resolve disputes over visitation and legal and physical custody. Absent a showing that dependency jurisdiction is required to protect these children, the family courts are highly experienced and well equipped to adjudicate these conflicts.[10]

It was reasonable for the court to conclude that it was not in the children's best interests to reunify with a parent who minimized continuing violence and her own role in placing the children at risk. Although the court did not "make a finding either in writing

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10 Alisa asks this court to take as additional evidence (Code Civ. Proc., § 909) information set forth in the brief of the children's appellate counsel. The children's brief states, "for informational purposes only," that pursuant to Alisa's and Andrew's agreement, C.S. was returned to Alisa's home in January 2012; A.S. is also living in the home; his dependency case remains open; and "[t]he social worker has expressed an intent to seek additional services for [C.S.] while she resides in San Diego with [A.S.] and [Alisa]." Alisa argues this information shows "there absolutely *is* reunification potential between mother and her children in the near future." Consistent with *In re Zeth S.* (2003) 31 Cal.4th 396, we deny Alisa's request. However, were we to consider the information, it would provide no insight into why Alisa and Andrew agreed that C.S. would live with Alisa or how long that arrangement would last; additionally it would tell us nothing about L.S. and J.S. If the parents expect C.S. to live with Alisa for an extended period this will necessitate modification of the juvenile court's custody and visitation order as the current arrangement is inconsistent with the juvenile court's existing order.

or on the record of the basis for its" choice of the option set forth in section 361.2, subdivision (b)(1), as required (§ 361.2, subd. (c); Cal. Rules of Court, rule 5.695(a)(7)(A)), the record supports the court's implicit finding that this choice was in the children's best interests. Thus, any error was harmless. (See *In re Diamond H., supra*, 82 Cal.App.4th at p. 1137.)

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.